TO: SEC HEALTH
FROM: BOB MARSHALL

103d Congress
1st Session

SENATE

DOCUMENT
No. 103–6

THE CONSTITUTION

of the

UNITED STATES OF AMERICA

ANALYSIS AND INTERPRETATION

ANNOTATIONS OF CASES DECIDED BY THE
SUPREME COURT OF THE UNITED STATES
TO JUNE 29, 1992

PREPARED BY THE
CONGRESSIONAL RESEARCH SERVICE
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JOHNNY H. KILLIAN
GEORGE A. COSTELLO
CO-EDITORS

68–766 CC

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1996

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402

THE NEW EQUAL PROTECTION

Classifications Meriting Close Scrutiny

Alienage and Nationality.—"It has long been settled . . . that the term 'person' [in the equal protection clause] encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside."[1] Thus, one of the earliest equal protection decisions struck down the administration of a facially-lawful licensing ordinance which was being applied to discriminate against Chinese.[2] But the Court in many cases thereafter recognized a permissible state interest in distinguishing between its citizens and aliens by restricting enjoyment of resources and public employment to its own citizens.[3] But in *Hirabayashi v. United States*,[4] it was announced that "[d]istinctions between citizens solely because of their ancestry" was "odius to a free people whose institutions are founded upon the doctrine of equality." And in *Korematsu v. United States*,[5] classifications based upon race and nationality were said to be suspect and subject to the "most rigid scrutiny." These dicta resulted in a 1948 decision which appeared

[1] Graham v. Richardson, 403 U.S. 365, 371 (1971). *See also* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886); Truax v. Raich, 239 U.S. 33, 39 (1915); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 420 (1948). Aliens, even unlawful aliens, are "persons" to whom the Fifth and Fourteenth Amendments apply. Plyler v. Doe, 457 U.S. 202, 210–16 (1982). The Federal Government may not discriminate invidiously against aliens, Mathews v. Diaz, 426 U.S. 67, 77 (1976). However, because of the plenary power delegated by the Constitution to the national government to deal with aliens and naturalization, federal classifications are judged by less demanding standards than are those of the States, and many classifications which would fail if attempted by the States have been sustained because Congress has made them. Id. at 78–84; Fiallo v. Bell, 430 U.S. 787 (1977). Additionally, state discrimination against aliens may fail because it imposes burdens not permitted or contemplated by Congress in its regulations of admission and conditions of admission. Hines v. Davidowitz, 312 U.S. 52 (1941); Toll v. Moreno, 458 U.S. 1 (1982). Such state discrimination may also violate treaty obligations and be void under the supremacy clause, Askura v. City of Seattle, 265 U.S. 332 (1924), and some federal civil rights statutes, such as 42 U.S.C. § 1981, protect resident aliens as well as citizens. Graham v. Richardson, supra, at 376–80.

[2] Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[3] McGready v. Virginia, 94 U.S. 391 (1877); Patsone v. Pennsylvania, 232 U.S. 138 (1914) (limiting aliens' rights to develop natural resources); Hauenstein v. Lynham, 100 U.S. 483 (1880); Blythe v. Hinckley, 180 U.S. 333 (1901) (restriction of devolution of property to aliens); Terrace v. Thompson, 263 U.S. 197 (1923); Porterfield v. Webb, 263 U.S. 225 (1923); Webb v. O'Brien, 263 U.S. 313 (1923); Frick v. Webb, 263 U.S. 326 (1923) (denial of right to own and acquire land); Heim v. McCall, 239 U.S. 175 (1915); People v. Crane, 214 N.Y. 154, 108 N.E. 427, aff'd, 239 U.S. 195 (1915) (barring public employment to aliens); Ohio ex rel. Clarke v. Deckebach, 274 U.S. 392 (1927) (prohibiting aliens from operating poolrooms). The Court struck down a statute restricting the employment of aliens by private employers, however. Truax v. Raich, 239 U.S. 33 (1915).

[4] 320 U.S. 81, 100 (1943).

[5] 323 U.S. 214, 216 (1944).

to call into question the rationale of the "particular interest" doctrine under which earlier discriminations had been justified. There the Court held void a statute barring issuance of commerical fishing licenses to persons "ineligible to citizenship," which in effect meant resident alien Japanese.[6] "The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under nondiscriminatory laws." Justice Black said for the Court that "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits."[7]

Announcing "that classifications based on alienage . . . are inherently suspect and subject to close scrutiny," the Court struck down state statutes which either wholly disqualified resident aliens for welfare assistance or imposed a lengthy durational residency requirement on eligibility.[8] Thereafter, in a series of decisions, the Court adhered to its conclusion that alienage was a suspect classification and voided a variety of restrictions. More recently, however, it has created a major "political function" exception to strict scrutiny review, which shows some potential of displacing the previous analysis almost entirely.

In *Sugarman v. Dougall*,[9] the Court voided the total exclusion of aliens from a State's competitive civil service. A State's power "to preserve the basic conception of a political community" enables it to prescribe the qualifications of its officers and voters,[10] the Court held, and this power would extend "also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government."[11] But a flat ban upon much of the State's career public service, both of policy-making and non-policy-making jobs, ran afoul of the requirement that in achieving a valid interest through the use of a suspect classifica-

[6] Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).

[7] Id. at 420. The decision was preceded by Oyama v. California, 332 U.S. 633 (1948), which was also susceptible to being read as questioning the premise of the earlier cases.

[8] Graham v. Richardson, 403 U.S. 365, 372 (1971).

[9] 413 U.S. 634 (1973).

[10] Id. at 647–49. *See also* Foley v. Connelie, 435 U.S. 291, 296 (1978). Aliens can be excluded from voting, Skafte v. Rorex, 553 P.2d 830 (Colo. 1976), appeal dismissed for lack of substantial federal question, 430 U.S. 961 (1977), and can be excluded from service on juries. Perkins v. Smith, 370 F. Supp. 134 (D.Md. 1974) (3-judge court), aff'd, 426 U.S. 913 (1976).

[11] Sugarman v. Dougall, 413 U.S. 634, 647 (1973). Such state restrictions are "not wholly immune from scrutiny under the Equal Protection Clause." Id. at 648.

tion the State must employ means that are precisely drawn in light of the valid purpose.[12]

State bars against the admission of aliens to the practice of law were also struck down, the Court holding that the State had not met the "heavy burden" of showing that its denial of admission to aliens was necessary to accomplish a constitutionally permissible and substantial interest. The State's admitted interest in assuring the requisite qualifications of persons licensed to practice law could be adequately served by judging applicants on a case-by-case basis and in no sense could the fact that a lawyer is considered to be an officer of the court serve as a valid justification for a flat prohibition.[13] Nor could Puerto Rico offer a justification for excluding aliens from one of the "common occupations of the community," hence its bar on licensing aliens as civil engineers was voided.[14]

In *Nyquist v. Mauclet*,[15] the Court seemed to expand the doctrine. Challenged was a statute that restricted the receipt of scholarships and similar financial support to citizens or to aliens who were applying for citizenship or who filed a statement affirming their intent to apply as soon as they became eligible. Therefore, since any alien could escape the limitation by a voluntary act, the disqualification was not aimed at aliens as a class, nor was it based on an immutable characteristic possessed by a "discrete and insular minority"—the classification that had been the basis for declaring alienage a suspect category in the first place. But the Court voided the statute. "The important points are that § 661(3) is directed at aliens and that only aliens are harmed by it. The fact that the statute is not an absolute bar does not mean that it does not discriminate against the class."[16] Two proffered justifications

[12] Justice Rehnquist dissented. Id. at 649. In the course of the opinion, the Court held inapplicable the doctrine of "special public interest," the idea that a State's concern with the restriction of the resources of the State to the advancement and profit of its citizens is a valid basis for discrimination against out-of-state citizens and aliens generally, but it did not declare the doctrine invalid. Id. at 643–45. The "political function" exception is inapplicable to notaries public, who do not perform functions going to the heart of representative government. Bernal v. Fainter, 467 U.S. 216 (1984).

[13] In re Griffiths, 413 U.S. 717 (1973). Chief Justice Burger and Justice Rehnquist dissented. Id. at 730, and 649 (*Sugarman* dissent also applicable to *Griffiths*).

[14] Examining Board v. Flores de Otero, 426 U.S. 572 (1976). Since the jurisdiction was Puerto Rico, the Court was not sure whether the requirement should be governed by the Fifth or Fourteenth Amendment but deemed the question immaterial since the same result would be achieved. The quoted expression is from Truax v. Raich, 239 U.S. 33, 41 (1915).

[15] 432 U.S. 1 (1977).

[16] Id. at 9. Chief Justice Burger and Justices Powell, Rehnquist, and Stewart dissented. Id. at 12, 15, 17. Justice Rehnquist's dissent argued that the nature of the disqualification precluded it from being considered suspect.

were held insufficient to meet the high burden imposed by the strict scrutiny doctrine.

However, in the following Term, the Court denied that every exclusion of aliens was subject to strict scrutiny, "because to do so would 'obliterate all the distinctions between citizens and aliens, and thus deprecate the historic values of citizenship.'" [17] Upholding a state restriction against aliens qualifying as state policemen, the Court reasoned that the permissible distinction between citizen and alien is that the former "is entitled to participate in the processes of democratic decisionmaking. Accordingly, we have recognized 'a State's historic power to exclude aliens from participation in its democratic political institutions,' . . . as part of the sovereign's obligation "'to preserve the basic conception of a political community.'" [18] When a State acts thusly by classifying against aliens, its action is not subject to strict scrutiny but rather need only meet the rational basis test. It is therefore permissible to reserve to citizens offices having the "most important policy responsibilities," a reservation drawn from *Sugarman*, but the critical factor in this case is the analysis finding that the police function is "one of the basic functions of government." "The execution of the broad powers vested" in police officers "affects members of the public significantly and often in the most sensitive areas of daily life. . . . Clearly the exercise of police authority calls for a very high degree of judgment and discretion, the abuse or misuse of which can have serious impact on individuals. The office of a policeman is in no sense one of 'the common occupations of the community'. . . ." [19]

Continuing to enlarge the exception, the Court in *Ambach v. Norwick* [20] upheld a bar to qualifying as a public school teacher for

[17] Foley v. Connelie, 435 U.S. 291, 295 (1978). The opinion was by Chief Justice Burger and the quoted phrase was from his dissent in Nyquist v. Mauclet, 432 U.S. 1, 14 (1977). Justices Marshall, Stevens, and Brennan dissented. Id. at 302, 307.

[18] Id. at 295–96. Formally following Sugarman v. Dougall, supra, the opinion considerably enlarged the exception noted in that case; *see also* Nyquist v. Mauclet, 432 U.S. 1, 11 (1977) (emphasizing the "narrowness of the exception"). Concurring in *Foley*, supra, 300, Justice Stewart observed that "it is difficult if not impossible to reconcile the Court's judgment in this case with the full sweep of the reasoning and authority of some of our past decisions. It is only because I have become increasingly doubtful about the validity of those decisions (in at least some of which I concurred) that I join the opinion of the Court in this case." On the other hand, Justice Blackmun, who had written several of the past decisions, including *Mauclet*, concurred also, finding the case consistent. Id.

[19] Id. at 297–98. In Elrod v. Burns, 427 U.S. 347 (1976), barring patronage dismissals of police officers, the Court had nonetheless recognized an exception for policymaking officers which it did not extend to the police.

[20] 441 U.S. 68 (1979). The opinion, by Justice Powell, was joined by Chief Justice Burger and Justices Stewart, White, and Rehnquist. Dissenting were Justices Blackmun, Brennan, Marshall, and Stevens. The disqualification standard was of

resident aliens who have not manifested an intention to apply for citizenship. The "governmental function" test took on added significance, the Court saying that the "distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State."[21] Thus, "governmental entities, when exercising the functions of government, have wider latitude in limiting the participation of noncitizens."[22] Teachers, the Court thought, because of the role of public education in inculcating civic values and in preparing children for participation in society as citizens and because of the responsibility and discretion they have in fulfilling that role, perform a task that "go[es] to the heart of representative government."[23] The citizenship requirement need only bear a rational relationship to the state interest, and the Court concluded it clearly did so.

Then, in *Cabell v. Chavez-Salido*,[24] the Court sustained a state law imposing a citizenship requirement upon all positions designated as "peace officers," upholding in context that eligibility prerequisite for probation officers. First, the Court held that the extension of the requirement to an enormous range of people who were variously classified as "peace officers" did not reach so far nor was it so broad and haphazard as to belie the claim that the State was attempting to ensure that an important function of government be in the hands of those having a bond of citizenship. "[T]he classifications used need not be precise; there need only be a substantial fit."[25] As to the particular positions, the Court held that "they, like the state troopers involved in *Foley*, sufficiently partake of the sovereign's power to exercise coercive force over the individual that they may be limited to citizens."[26]

Thus, the Court so far has drawn a tripartite differentiation with respect to governmental restrictions on aliens. First, it has disapproved the earlier line of cases and now would foreclose attempts by the States to retain certain economic benefits, primarily employment and opportunities for livelihood, exclusively for citizens. Second, when government exercises principally its spending functions, such as those with respect to public employment gen-

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course, that held invalid as a disqualification for receipt of educational assistance in Nyquist v. Mauclet, 432 U.S. 1 (1977).

[21] Ambach v. Norwick, 441 U.S. 68, 75 (1979).

[22] Id.

[23] Id. at 75–80. The quotation, id. at 76, is from Sugarman v. Dougall, 413 U.S. 634, 647 (1973).

[24] 454 U.S. 432 (1982). Joining the opinion of the Court were Justices White, Powell, Rehnquist, O'Connor, and Chief Justice Burger. Dissenting were Justices Blackmun, Brennan, Marshall, and Stevens. Id. at 447.

[25] Id. at 442.

[26] Id. at 445.

erally and to eligibility for public benefits, its classifications with an adverse impact on aliens will be strictly scrutinized and usually fail. Third, when government acts in its sovereign capacity, when it acts within its constitutional prerogatives and responsibilities to establish and operate its own government, its decisions with respect to the citizenship qualifications of an appropriately designated class of public office holders will be subject only to traditional rational basis scrutiny.[27] However, the "political function" standard is elastic, and so long as disqualifications are attached to specific occupations[28] rather than to the civil service in general, as in *Sugarman*, the concept seems capable of encompassing the exclusion.

When confronted with a state statute that authorized local school boards to exclude from public schools alien children who were not legally admitted to the United States, the Court determined that an intermediate level of scrutiny was appropriate and found that the proffered justifications did not sustain the classification.[29] Inasmuch as it was clear that the undocumented status of the children was not irrelevant to valid government goals and inasmuch as the Court had previously held that access to education was not a "fundamental interest" which triggered strict scrutiny of governmental distinctions relating to education,[30] the Court's decision to accord intermediate review was based upon an amalgam of at least three factors. First, alienage was a characteristic that provokes special judicial protection when used as a basis for discrimination. Second, the children were innocent parties who were having a particular onus imposed on them because of the misconduct of their parents. Third, the total denial of an education to these chil-

[27] Id. at 438–39

[28] Thus, the statute in *Chavez-Salido* applied to such positions as toll-service employees, cemetery sextons, fish and game wardens, and furniture and bedding inspectors, and yet the overall classification was deemed not so ill-fitting as to require its voiding.

[29] Plyler v. Doe, 457 U.S. 432 (1982). Joining the opinion of the Court were Justices Brennan, Marshall, Blackmun, Powell, and Stevens. Dissenting were Chief Justice Burger and Justices White, Rehnquist, and O'Connor. Id. at 242.

[30] In San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973), while holding that education is not a fundamental interest, the Court expressly reserved the question whether a total denial of education to a class of children would infringe upon a fundamental interest. Id.at 18, 25 n.60, 37. The *Plyler* Court's emphasis upon the total denial of education and the generally suspect nature of alienage classifications left ambiguous whether the state discrimination would have been subjected to strict scrutiny if it had survived intermediate scrutiny. Justice Powell thought the Court had rejected strict scrutiny, 457 U.S. at 238 n.2 (concurring), while Justice Blackmun thought it had not reached the question, id. at 235 n.3 (concurring). Indeed, their concurring opinions seem directed more toward the disability visited upon innocent children than the broader complex of factors set out in the opinion of the Court. Id.at 231, 236.

dren would stamp them with an "enduring disability" that would harm both them and the State all their lives.[31] The Court evaluated each of the State's attempted justifications and found none of them satisfying the level of review demanded.[32] It seems evident that *Plyler v. Doe* is a unique case and that whatever it may doctrinally stand for, a sufficiently similar factual situation calling for application of its standards is unlikely to be replicated.

Sex.—Shortly after ratification of the Fourteenth Amendment, the refusal of Illinois to license a woman to practice law was challenged before the Supreme Court, and the Court rejected the challenge in tones which prevailed well into the twentieth century. "The civil law, as well as nature itself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood."[33] On the same premise, a statute restricting the franchise to men was sustained.[34]

The greater number of cases have involved legislation aimed to protect women from oppressive working conditions, as by prescrib-

[31] Id. at 223–24.

[32] Rejected state interests included preserving limited resources for its lawful residents, deterring an influx of illegal aliens, avoiding the special burden caused by these children, and serving children who were more likely to remain in the State and contribute to its welfare. Id. at 227–30.

[33] Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873). The cases involving alleged discrimination against women contain large numbers of quaint quotations from unlikely sources. Upholding a law which imposed a fee upon all persons engaged in the laundry business, but excepting businesses employing not more than two women, Justice Holmes said: "If Montana deems it advisable to put a lighter burden upon women than upon men with regard to an employment that our people commonly regard as more appropriate for the former, the Fourteenth Amendment does not interfere by creating a fictitious equality where there is a real difference." Quong Wing v. Kirkendall, 223 U.S. 59, 63 (1912). And upholding a law prohibiting most women from tending bar, Justice Frankfurter said: "The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic. . . . The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards." Goesaert v. Cleary, 335 U.S. 464, 466 (1948).

[34] Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875) (privileges and immunities).

upon a person who was statutorily naturalized "outside" the United States, and held not within the protection of the first sentence of § 1 of the Fourteenth Amendment.[1198] Thus, while *Afroyim* was distinguished, the tenor of the majority opinion was hostile to its holding, and it may be that in a future case it will be overruled.

The issue, then, of the constitutionality of congressionally-prescribed expatriation must be taken as unsettled.

ALIENS

The Power of Congress to Exclude Aliens

The power of Congress "to exclude aliens from the United States and to prescribe the terms and conditions on which they come in" is absolute, being an attribute of the United States as a sovereign nation. "That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens, it would be to that extent subject to the control of another power. . . . The United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory."[1199]

[1198] Rogers v. Bellei, 401 U.S. 815 (1971). The three remaining *Afroyim* dissenters plus Chief Justice Burger and Justice Blackmun made up the majority, the three remaining Justices of the *Afroyim* majority plus Justice Marshall made up the dissenters. The continuing vitality of *Afroyim* was assumed in Vance v. Terrazas, 444 U. S. 252 (1980), in which a divided Court upheld a congressionally-imposed standard of proof, preponderance of evidence, by which to determine whether one had by his actions renounced his citizenship.

[1199] Chinese Exclusion Case (Chae Chan Ping v. United States), 130 U.S. 581, 603, 604 (1889); see also Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893); The Japanese Immigrant Case (Yamataya v. Fisher), 189 U.S. 86 (1903); United States ex rel. Turner v. Williams, 194 U.S. 279 (1904); Bugajewitz v. Adams, 228 U.S. 585 (1913); Hines v. Davidowitz, 312 U.S. 52 (1941); Kleindeist v. Mandel, 408 U. S. 753 (1972). In Galvan v. Press, 347 U.S. 522, 530–531 (1954), Justice Frankfurter for the Court wrote: "[M]uch could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. . . . But the slate is not clean. As to the extent of the power of Congress under review, there is not merely 'a page of history,' . . . but a whole volume. . . . [T]hat the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government." Although the issue of racial discrimination was before the Court in Jean v. Nelson, 472 U.S. 846 (1985), in the context of parole for undocumented aliens, the Court avoided it, holding that statutes and regulations precluded INS considerations of race or national origin. Justices Marshall and Bren-

Except for the Alien Act of 1798,[1200] Congress went almost a century without enacting laws regulating immigration into the United States. The first such statute, in 1875, barred convicts and prostitutes[1201] and was followed by a series of exclusions based on health, criminal, moral, economic, and subversion considerations.[1202] Another important phase was begun with passage of the Chinese Exclusion Act in 1882,[1203] which was not repealed until 1943.[1204] In 1924, Congress enacted into law a national origins quota formula which based the proportion of admittable aliens on the nationality breakdown of the 1920 census, which, of course, was heavily weighed in favor of English and northern European ancestry.[1205] This national origins quota system was in effect until it was repealed in 1965.[1206] The basic law remains the Immigra-

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nan, in dissent, argued for reconsideration of the long line of precedents and for constitutional restrictions on the Government. Id., 858. That there exists *some* limitation upon exclusion of aliens is one permissible interpretation of Reagan v. Abourezk, 484 U.S. 1 (1987), *affg. by an equally divided Court*, 785 F.2d 1043 (D.C.Cir. 1986), holding that mere membership in the Communist Party could not be used to exclude an alien on the ground that his activities might be prejudicial to the interests of the United States.

The power of Congress to prescribe the rules for exclusion or expulsion of aliens is a "fundamental sovereign attribute" which is "of a political character and therefore subject only to narrow judicial review." Hampton v. Mow Sun Wong, 426 U.S. 88, 101 n. 21 (1976); Mathews v. Diaz, 426 U.S. 67, 81–82 (1976); Fiallo v. Bell, 430 U.S. 787, 792 (1977). Although aliens are "an identifiable class of persons," who aside from the classification at issue "are already subject to disadvantages not shared by the remainder of the community," *Hampton v. Mow Sun Wong, supra*, 102, Congress may treat them in ways that would violate the equal protection clause if a State should do it. *Diaz, supra* (residency requirement for welfare benefits); *Fiallo, supra* (sex and illegitimacy classifications). Nonetheless in *Mow Sun Wong, supra*, 103, the Court observed that when the Federal Government asserts an overriding national interest as justification for a discriminatory rule that would violate the equal protection clause if adopted by a State, due process requires that it be shown that the rule was actually intended to serve that interest. The case struck down a classification that the Court thought justified by the interest asserted but that had not been imposed by a body charged with effectuating that interest. See Vergara v. Hampton, 581 F.2d 1281 (C.A. 7, 1978).

[1200] Act of June 25, 1798, 1 Stat. 570. The Act was part of the Alien and Sedition Laws and authorized the expulsion of any alien the President deemed dangerous.

[1201] Act of March 3, 1875, 18 Stat. 477.

[1202] 22 Stat. 214 (1882) (excluding idiots, lunatics, convicts, and persons likely to become public charges); 23 Stat. 332 (1885), and 24 Stat. 414 (1887) (regulating importing cheap foreign labor); 26 Stat. 1084 (1891) (persons suffering from certain diseases, those convicted of crimes involving moral turpitude, paupers, and polygamists); 32 Stat. 1213 (1903) (epileptics, insane persons, professional beggars, and anarchists); 34 Stat. 898 (1907) (feeble-minded, children unaccompanied by parents, persons suffering with tuberculosis, and women coming to the United States for prostitution or other immoral purposes).

[1203] Act of May 6, 1882, 22 Stat. 58.

[1204] Act of December 17, 1943, 57 Stat. 600.

[1205] Act of May 26, 1924, 43 Stat. 153.

[1206] Act of October 3, 1965, P.L. 89–236, 79 Stat. 911.

tion and Nationality Act of 1952,[1207] which, with certain revisions in 1965 and later piecemeal alterations, regulates who may be admitted and under what conditions; the Act, it should be noted, contains a list of 31 excludable classes of aliens.[1208]

Numerous cases underscore the sweeping nature of the powers of the Federal Government to exclude aliens and to deport by administrative process persons in excluded classes. For example, in *United States ex rel. Knauff v. Shaughnessy*,[1209] an order of the Attorney General excluding, on the basis of confidential information he would not disclose, a wartime bride, who was *prima facie* entitled to enter the United States,[1210] was held to be unreviewable by the courts. Nor were regulations on which the order was based invalid as an undue delegation of legislative power. "Normally Congress supplies the conditions of the privilege of entry into the United States. But because the power of exclusion of aliens is also inherent in the executive department of the sovereign, Congress may in broad terms authorize the executive to exercise the power, e.g., as was done here, for the best interest of the country during a time of national emergency. Executive officers may be entrusted with the duty of specifying the procedures for carrying out the congressional intent."[1211] However, when Congress has spelled out the basis for exclusion or deportation, the Court remains free to interpret the statute and review the administration of it and to apply it, often in a manner to mitigate the effects of the law on aliens.[1212]

Congress' power to admit aliens under whatever conditions it lays down is exclusive of state regulation. The States "can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states. State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived

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[1207] Act of June 27, 1952, P.L. 82–414, 66 Stat. 163, 8 U.S.C. §§ 1101 et seq. as amended.

[1208] The list of excludable aliens may be found at 8 U.S.C. § 1182. The list has been modified and classified by category in recent amendments.

[1209] 338 U.S. 537 (1950). See also Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953), in which the Court majority upheld the Government's power to exclude on the basis of information it would not disclose a permanent resident who had gone abroad for about nineteen months and was seeking to return on a new visa. But the Court will frequently read the applicable statutes and regulations strictly against the Government for the benefit of persons sought to be excluded. Cf. Delgadillo v. Carmichael, 332 U.S. 388 (1947); Kwong Hai Chew v. Colding, 344 U.S. 590 (1953); Rosenburg v. Fleuti, 374 U.S. 449 (1963).

[1210] Under the War Brides Act of 1945, 59 Stat. 659.

[1211] Id., 338 U.S., 543.

[1212] E.g., Immigration and Naturalization Service v. Errico, 385 U.S. 214 (1966).

federal power to regulate immigration, and have accordingly been held invalid."[1213] This principle, however, has not precluded all state regulations dealing with aliens.[1214] The power of Congress to legislate with respect to the conduct of alien residents is a concomitant of its power to prescribe the terms and conditions on which they may enter the United States, to establish regulations for sending out of the country such aliens as have entered in violation of law, and to commit the enforcement of such conditions and regulations to executive officers. It is not a power to lay down a special code of conduct for alien residents or to govern their private relations.[1215]

Yet Congress is empowered to assert a considerable degree of control over aliens after their admission to the country. By the Alien Registration Act of 1940, Congress provided that all aliens in the United States, fourteen years of age and over, should submit to registration and finger printing and willful failure to comply was made a criminal offense against the United States.[1216] This Act, taken in conjunction with other laws regulating immigration and naturalization, has constituted a comprehensive and uniform system for the regulation of all aliens.[1217]

An important benefit of this comprehensive regulation accruing to the alien is that it precludes state regulation that may well be more severe and burdensome. For example, in *Hines v. Davidowitz*,[1218] the Court voided a Pennsylvania law requiring the annual registration and fingerprinting of aliens but going beyond the subsequently-enacted federal law to require acquisition of an alien identification card that had to be carried at all times and to be exhibited to any police officer upon demand and to other licensing officers upon applications for such things as drivers' licenses. The Court did not squarely hold the State incapable of having such a law in the absence of federal law but appeared to lean in that

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[1213] Takahashi v. Fish & Game Commission, 334 U.S. 410, 419 (1948); De Canas v. Bica, 424 U.S. 351, 358 n. 6 (1976); Toll v. Moreno, 458 U.S. 1, 12–13 (1982). See also Hines v. Davidowitz, 312 U.S. 52, 66 (1941); Graham v. Richardson, 403 U.S. 365, 376–380 (1971).

[1214] E.g., Heim v. McCall, 239 U.S. 175 (1915); Ohio ex rel. Clarke v. Deckebach, 274 U.S. 392 (1927); Sugarman v. Dougall, 413 U.S. 634, 646–649 (1973); De Canas v. Bica, 424 U.S. 351 (1976); Cabell v. Chavez-Salido, 454 U.S. 432 (1982).

[1215] Purporting to enforce this distinction, the Court voided a statute, which, in prohibiting the importation of "any alien woman or girl for the purpose of prostitution," provided that whoever should keep for the purpose of prostitution "any alien woman or girl within three years after she shall have entered the United States" should be deemed guilty of a felony. Keller v. United States, 213 U.S. 138 (1909).

[1216] 54 Stat. 670, 8 U.S.C. §§ 1301–1306.

[1217] See Hines v. Davidowitz, 312 U.S. 52, 69–70 (1941).

[1218] 312 U.S. 52 (1941).

direction.[1219] Another decision voided a Pennsylvania law limiting those eligible to welfare assistance to citizens and an Arizona law prescribing a fifteen-year durational residency period before an alien could be eligible for welfare assistance.[1220] Congress had provided, Justice Blackmun wrote for a unanimous Court, that persons who were likely to become public charges could not be admitted to the United States and that any alien who became a public charge within five years of his admission was to be deported unless he could show that the causes of his economic situation arose after his entry.[1221] Thus, in effect Congress had declared that lawfully admitted resident aliens who became public charges for causes arising after their entry were entitled to the full and equal benefit of all laws for the security of persons and property, and the States were disabled from denying aliens these benefits.[1222]

Deportation

Unlike the exclusion proceedings,[1223] deportation proceedings afford the alien a number of constitutional rights: a right against self-incrimination,[1224] protection against unreasonable searches and seizures,[1225] guarantees against *ex post facto* laws, bills of attainder, and cruel and unusual punishment,[1226] a right to bail,[1227] a right to procedural due process,[1228] a right to counsel,[1229] a right to notice of charges and hearing,[1230] as well as a right to cross-examine.[1231]

Notwithstanding these guarantees, the Supreme Court has upheld a number of statutory deportation measures as not uncon-

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[1219] Id., 68. But see De Canas v. Bica, 424 U.S. 351 (1976), in which the Court upheld a state law prohibiting an employer from hiring aliens not entitled to lawful residence in the United States. The Court wrote that States may enact legislation touching upon aliens coexistent with federal laws, under regular preemption standards, unless the nature of the regulated subject matter precludes the conclusion or unless Congress has unmistakably ordained the impermissibility of state law.

[1220] Graham v. Richardson, 403 U.S. 365 (1971). See also Sugarman v. Dougall, 413 U.S. 634 (1973); In re Griffiths, 413 U.S. 717 (1973); Cabell v. Chavez-Salido, 454 U.S. 432 (1982).

[1221] 8 U.S.C. §§ 1182(a)(8), 1182(a)(15), 1251(a)(8).

[1222] See 42 U.S.C. § 1981, applied in Takahashi v. Fish and Game Commission, 334 U.S. 410, 419 n. 7 (1948).

[1223] See United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950), where the Court noted that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."

[1224] Kimm v. Rosenberg, 363 U.S. 405 (1960).

[1225] Abel v. United States, 362 U.S. 217, 229 (1960).

[1226] Marcello v. Bonds, 349 U.S. 302 (1955).

[1227] Carlson v. Landon, 342 U.S. 524, 540 (1952).

[1228] Wong Yang Sung v. McGrath, 339 U.S. 33, 49 (1950).

[1229] 8 U.S.C. § 1252(b)(2).

[1230] 8 U.S.C. § 1252(b)(1).

[1231] 8 U.S.C. § 1252(b)(3).

stitutional. The Internal Security Act of 1950, in authorizing the Attorney General to hold in custody, without bail, aliens who are members of the Communist Party of the United States, pending determination as to their deportability, is not unconstitutional.[1232] Nor was it unconstitutional to deport under the Alien Registration Act of 1940[1233] a legally resident alien because of membership in the Communist Party, although such membership ended before the enactment of the Act. Such application of the Act did not make it *ex post facto*, being but an exercise of the power of the United States to treminate its hospitality *ad libitum*.[1234] And a statutory provision[1235] making it a felony for an alien against whom a specified order of deportation is outstanding "to willfully fail or refuse to make timely application for travel or other documents necessary to his departure" was not on its face void for "vagueness."[1236]

BANKRUPTCY

Persons Who May Be Released From Debt

In an early case on circuit, Justice Livingston suggested that inasmuch as the English statutes on the subject of bankruptcy from the time of Henry VIII down had applied only to traders it might "well be doubted, whether an act of Congress subjecting to such a law every description of persons within the United States, would comport with the spirit of the powers vested in them in relation to this subject."[1237] Neither Congress nor the Supreme Court has ever accepted this limited view. The first bankruptcy law, passed in 1800, departed from the English practice to the extent of including bankers, brokers, factors and underwriters as well as traders.[1238] Asserting that the narrow scope of the English statutes was a mere matter of policy, which by no means entered into the nature of such laws, Justice Story defined bankruptcy legislation in the sense of the Constitution as a law making provisions for cases of persons failing to pay their debts.[1239]

This interpretation has been ratified by the Supreme Court. In *Hanover National Bank v. Moyses*,[1240] it held valid the Bankruptcy Act of 1898, which provided that persons other than traders might

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[1232] Carlson v. Landon, 342 U.S. 524 (1952).
[1233] 54 Stat. 670. For existing statutory provisions as to deportation, see 8 U.S.C. § 1251 *et seq.*
[1234] Carlson v. Landon, 342 U.S. 524 (1952).
[1235] 8 U.S.C. § 1252(e).
[1236] United States v. Spector, 343 U.S. 169 (1952).
[1237] Adams v. Storey, 1 Fed. Cas. 141, 142 (No. 66) (C.C.D.N.Y. 1817).
[1238] 2 Stat. 19 (1800).
[1239] 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Boston: 1833), 1113.
[1240] 186 U.S. 181 (1902).